

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

76-6171

DOCKET NO.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

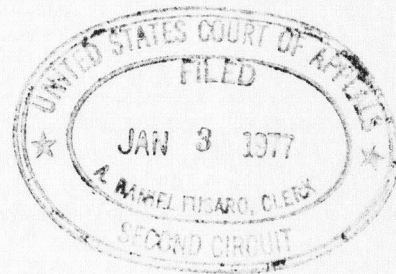
NAPOLEON RICHARDSON and
FRANCISCO CHAIMOWICZ, as
Executors of the Estate of
CONCEPCION BRODERMANN STUETZEL,
also known as CONCEPCION
BRODERMANN,

Plaintiffs,

- against -

WILLIAM E. SIMON, as Secretary of
the Treasury of the United States,
and the BANK OF NOVA SCOTIA,

Defendants.



APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFFS-APPELLANTS,
NAPOLEON RICHARDSON and FRANCISCO
CHAIMOWICZ

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STATEMENT OF THE ISSUES

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I. IS THE APPLICATION OF THE TREASURY DEPARTMENT OF THE
CUBAN ASSETS CONTROL REGULATIONS BY THE TREASURY
DEPARTMENT TO THE PLAINTIFFS-APPELLANTS VOID AS NOT
AUTHORIZED BY THE TRADING WITH THE ENEMY ACT.

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II. DOES THE REFUSAL BY THE TREASURY DEPARTMENT TO UNBLOCK
THE FUNDS OF THE PLAINTIFFS-APPELLANTS IN POSSESSION
OF THE BANK OF NOVA SCOTIA CONSTITUTE A DEPRIVATION OF
ITS PROPERTY IN CONTRAVENTION OF THE FIFTH AMENDMENT
OF THE CONSTITUTION

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STATEMENT OF THE CASE

This action is brought to require the Treasury Department to issue a license for the release of "blocked" securities and cash which had been deposited for safe-keeping with the Bank of Nova Scotia.

After the complaint was served, the Secretary of the Treasury moved to dismiss on the ground that the complaint fails to state a claim upon which relief can be granted. The plaintiffs cross-moved for summary judgment on the ground that there was no genuine issue of fact and that plaintiffs are entitled to judgment as a matter of law.

The Treasury Department did not submit any affidavit in opposition to the motion for summary judgment but did submit a memorandum of law, in which the facts alleged in the complaint were admitted to be true for the purposes of the motion (Page 2 of Memorandum of U. S. Page 6 of Record on Appeal).

The Bank of Nova Scotia submitted an affidavit by its attorney admitting they had a joint account in the name of Carl Stuetzel and/or Concepcion Brodermann, also known as Concepcion Brodermann Stuetzel "subject to a joint account agreement providing for payment to either or to the survivor upon the death of either. . . The Bank is not interested in said account except to pay the balance to the person or persons rightfully entitled thereto." (p. 11 of the Record on Appeal)

Both motions were heard by HONORABLE THOMAS C. PLATT, Judge of the Eastern District of New York who granted the Treasury Department's motion to dismiss the complaint and denied the plaintiff's motion for summary judgment.

This appeal is from such order.

The facts are undisputed.

Carl W. Stuetzel was married to Concepcion Brodermann on September 15, 1906 in Havana, Cuba. Her husband was born in what is now a part of West Germany and became a citizen of Cuba in 1953. She was born in Cuba in 1883.

During their marriage Carl W. Stuetzel and his wife, Concepcion Brodermann Stuetzel jointly deposited for safekeeping cash and securities with the New York branch of the Bank of Nova Scotia.

Carl W. Stuetzel died intestate in Havana, Cuba on August 24, 1965 leaving him surviving only his wife, Concepcion Brodermann Stuetzel. They had no children.

Mrs. Stuetzel entered the United States as a permanent resident on October 13, 1969.

On November 4, 1969 she applied for the release of the securities and cash on deposit with the Bank of Nova Scotia. On December 12, 1969 a license was issued by the Secretary of the Treasury to release fifty (50%) per cent of the blocked securities and the cash on deposit. Such fifty (50%) per cent

was paid to her. The remaining fifty (50%) per cent remained blocked (Exhibit attached to complaint, p. 1 of Record on Appeal).

On Octobrr 31, 1971, Concepcion Brodermann Stuetzel died in Nassau County Medical Center, East Meadow, New York, a permanent resident of Nassau County, New York. Her Will was admitted to probate by the Surrogate's Court of Nassau County and plaintiffs were appointed executors in accordance with the provisions of her Will.

The Will also provides that her niece, Elena Richardson, is to receive the residuary estate which consists of the blocked securities and cash held by the Bank of Nova Scotia.

The plaintiffs and Elena Richardson are citizens of the United States and reside in the Eastern District of New York State.

POINT I

THE CUBAN ASSETS CONTROL REGULATIONS AS
APPLIED BY THE TREASURY DEPARTMENT TO
THE APPELLANTS AND MRS. STUETZEL ARE NOT
AUTHORIZED BY THE TRADING WITH THE ENEMY
ACT

Section 5(b) of the Trading with the Enemy Act is the source of power given to the President (and through him to the Secretary of the Treasury) to promulgate and enforce the Cuban Assets Control Regulations. It states:

"During the time of war or during any other period of national emergency declared by the President, the President may, through any

agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe by means of instructions, licenses, or otherwise -

(a) . . .

(b) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation, or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest, (emphasis supplied) by any person, or with respect to any property, subject to the jurisdiction of the United States."

The Cuban Assets Control Regulations (Title 31, Code of Federal Regulations, Chapter V, Part 515) prohibit transactions with designated foreign countries or their nationals. Some provisions of these regulations provide for unblocking of assets such as certain transfers by operation of law:

"Section 515.505 Certain persons in the United States unblocked.

(a) Except as provided in paragraph (b) of this section the following are hereby licensed as unblocked nationals:

(1) Any individual resident in and within the United States except an individual who on or after the "effective date" has acted or purported to act directly or indirectly for the benefit of or on behalf of a designated country...

"(b) This section does not license as an unblocked national any person who is a specially designated national"

Mrs. Stuetzel was a resident "in and within the United States. She has not acted or purported to act on behalf of a designated country (Cuba or any other). She was thus entitled to the status of an "unblocked national".

The plaintiffs come under the provisions of Section 515.507 by reason of their being citizens of the United States who have not acted or purported to act on behalf of a designated foreign country (Cuba or any other) :

"(a) Any individual who is a citizen of the United States, and who is a national of a designated foreign country solely by reason of having been formerly domiciled or resident therein is hereby licensed as an unblocked national."

It has not been contended by the Government that Mrs. Stuetzel ever acted or purported to act on behalf of the Cuban Government. She was duly admitted to the United States as a permanent resident.

Under New York law and Cuban law she became the owner of the entire fund on deposit with the Bank of Nova Scotia immediately upon the death of her husband. Section 675 of N.Y. State Banking Law.

The Treasury Department issued a license to Mrs.

Stuetzel for fifty (50%) per cent of the fund in the joint names of her husband and herself under its policy as stated on the bottom of the first page of its memorandum (p. 6 of the Record on Appeal):

"This license and the policy behind it are not in issue here. The license was issued under a policy of unblocking assets of resident Cuban refugees in which they have an ownership interest. There was a presumption of an undivided half interest in favor of plaintiffs' decedent, as the surviving spouse of Stuetzel, a Cuban citizen, on the basis of the Cuban community property law."

Yet with the declared policy of unblocking assets of resident Cuban refugees in which they have the ownership interest, the Treasury Department refuses to release the other fifty (50%) per cent claiming that Carl Stuetzel on his death in 1965 took these assets with him to the grave in Cuba although it still remains with the Bank of Nova Scotia in New York.

This case at bar is factually identical with *Real v. Simon*, 510 F 2d 557 (Fifth Circuit 1975) rehearing denied 514 F 2d 738. See also letter of Assistant Attorney General of the United States, dated August 12, 1975 in which the Clerk of the Fifth Circuit Court of Appeals is advised that a petition for Certiorari will not be filed with the Supreme Court. (Attached to memorandum of plaintiffs, p. 9-10 of Record on Appeal).

The Court of Appeals held that the heirs of Urbana -Real who also died in 1965 in Cuba were entitled to an

unrestricted license which will enable them to dispose of their respective shares of the account.

There was no contention in Real as there is none here that the Cuban Government has any right or claim to this property, nor is there any assertion that any person in Cuba has any interest in the property.

After pointing out the distinctions between the Sardino (361 F 2d 106), Nielson (424 F 2d 833) and Cheng (442 F 2d 460) cases and the Real case, the Court said:

"In contrast to the preceding cases, however, there is no living person in the "designated foreign country" (Cuba) who retains an interest in the blocked account in question here. If neither the government of Cuba nor any person in Cuba has any interest or claim to the blocked property, the Trading with the Enemy Act would be inapplicable, because the Act states that the power to prohibit or license transfers of property in the United States applies only to "any property in which any foreign country or a national thereof has any interest...." Trading with the Enemy Act, 50 U.S.C. App. Section 5(b)(1)(B)."

The Government argues that it may deem a decedent to have an interest in his estate. The Court of Appeals then described the purposes of the Trading with the Enemy Act as:

"(1) to deny to Cuba or its nationals hard currency which might be used to promote activities inimical to the interests of the United States. (2) to retain blocked funds for possible use or vesting to the United States should such a decision be made, and

(3) to use blocked funds for negotiation purposes in discussions with the Cuban government."

The Government claims that it can validly, within the scope of the Trading with the Enemy Act, determine that a deceased person retains an interest in his estate. The court in Real said:

"We hold that such a determination by the United States is arbitrary and without basis in either the language or the purpose of the Trading with the Enemy Act."

Administrative determinations must have a basis in law and must be within the granted authority:

"Administrative determinations must have a basis in law and must be within the granted authority." ' Social Security Board v. Nierotko, 327 U.S. 358; see Morton v. Ruiz, 415 U.S. 199; Red Lion Broadcasting Co. v. FCC, 395 U.S. 367."

The Government realizes that a Cuban interest must pertain to the assets in order to justify blocking. Therefore it must claim that the dead man who was a foreign national--no one else in this case is--took his assets with him to the grave.

The Court of Appeals in Real held this defies logic and does not have the support of congressional policies behind the Trading with the Enemy Act.

In support of its positions, the Court cites Morton v. Ruiz 415 U.S. 199; U.S. v. Minker 350 U.S. 179, Social Sec. Board v. Nierotko 327 U.S. 358 and concludes with:

"In line with these cases, we conclude that the Secretary of the Treasury exceeded his statutory authority in the interpretation and application of the Trading with the Enemy Act in such a manner as to deny these appellants their unrestricted interest in the estate of Urbano Real."

This conclusion applies to the case at bar.

POINT II

THE REFUSAL TO UNBLOCK THE FUNDS OF THE
PLAINTIFFS VIOLATES THE FIFTH AMENDMENT
TO THE CONSTITUTION

The Fifth Amendment to the Constitution of the
United States provides:

" . . . (No person shall be) deprived
of life, liberty, or property without
due process of law; nor shall private
property be taken for public use,
without just compensation."

"The Fifth Amendment applies equally to citizens of the United
States and alien friends. Russian Volunteer Fleet vs. U. S.
(1931) 282 U. S. 481".

The Secretary of the Treasury has adopted a policy
of immediately unblocking assets of a Cuban refugee upon his
or her entry into the United States as a permanent resident
Section 515.505. One-half of Real funds were released by the
Treasury Department as were one-half of the funds of Mrs. Stuetzel
in this case.

Under the Banking Law of New York (Section 675) Mrs.

Stuetzel became the owner of all the cash and funds on deposit with the Bank of Nova Scotia immediately upon the death of her husband. She also became the sole owner of these funds under the intestacy laws of New York. No one else, Cuban or otherwise, has made any claim on these funds.

The Government argues that it might choose to use these blocked funds to provide compensation to Americans whose property was confiscated by the Cuban Government.

The Court of Appeals in Real answers this argument by saying there is a "critical distinction" between cases where the claimants are American citizens or residents and where the claimants are those having a Cuban interest or other designated foreign national.

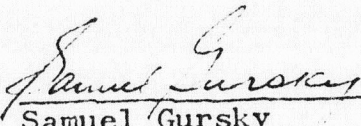
The issue then becomes one in which the Government argues that a dead man retains an interest in his estate. The Real decision holds that such a determination by the Treasury Department is not logical, is arbitrary and without basis in either the language or the purpose of the Trading with the Enemy Act.

The use of these funds which, undisputedly belonged to Mrs. Stuetzel and now belong to the plaintiffs for the purpose of compensating Americans whose property was confiscated by Cuba is a deprivation of plaintiffs' property without due process of law.

CONCLUSION

The order granting the Government's motion to dismiss the complaint and denying plaintiffs' motion for summary judgment should be reversed.

Respectfully submitted,



Samuel Gursky
Attorney for Plaintiffs-Appellants

AFFIDAVIT OF MAILING

STATE OF NEW YORK)
COUNTY OF NEW YORK) SS:

SAMUEL GURSKY, being duly sworn, says that on the
23rd day of December, 1976, I deposited in the Post Office
Box for mailing in premises 342 Madison Avenue, New York,
N.Y. two copies of the Appellants' Brief of which the
annexed is a true copy, contained in a securely enclosed
postpaid wrapper directed to the person hereinafter named,
the place and address stated below:

David G. Trager, Esq.
United States Attorney
Attorney for the Defendant- Appellee, William E. Simon
225 Cadman Plaza East
Brooklyn, N.Y. 11201

Sworn to before me this

23rd day of December, 1976

Myman Christen

Samuel Gursky

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